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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FAMILY INVESTMENT COMPANY, INC., et al., Plaintiffs and Appellants, v. MACH-1 AUTOGROUP, et al., Defendants and Respondents.	G047783 (Super. Ct. No. 30-2009-00126504) O P I N I O N
MACH-1 AUTOGROUP, et al., Defendants and Appellants, v. FAMILY INVESTMENT COMPANY, INC., et al., Plaintiffs and Respondents.	G048082 (Super. Ct. No. 30-2009-00126504)

Appeals from a judgment and a postjudgment order of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Reversed and remanded.

Law Office of Frank W. Battaile and Frank W. Battaile for Plaintiffs and Appellants in No. G047783 and Respondents in No. G048082.

Gittler & Bradford and Stephen H. Marcus; Wolff Law Corporation and Joshua W. Wolff for Defendants and Appellants in No. G048082 and Respondents in No. G047783.

* * *

The underlying action arises from the failed sale of a Honda dealership. The seller, Family Investment Company, Inc. (FIC), filed a breach of contract and fraud claim against the prospective buyer, MACH-1 Autogroup (Mach-1). Mach-1 filed a cross-complaint alleging, inter alia, breach of contract, fraud, and unjust enrichment against FIC, as well as the entities who later purchased the dealership, NewSunCo, Ltd., and RSM Motors, L.P. (collectively NewSunCo). After holding a bench trial, the court determined Mach-1 breached the final sales agreement but no damages were warranted because FIC sold the dealership to NewSunCo. In its statement of decision and final judgment, the court determined FIC, and its principal shareholder, Marc Spizzirri, were obligated to return $1,550,000 in deposits they received from Mach-1. The court denied objections and a new trial motion challenging the deposit repayment ruling. The court also denied Mach-1's motion for attorney fees on the grounds it was not the prevailing party. FIC and Spizzirri appeal from the ruling they must pay $1,550,000 to Mach-1. Mach-1's appeal challenges the attorney fee ruling.

We conclude the judgment must be reversed and the matter remanded for the trial court to reconsider the contractual obligations of the parties. In its statement of decision, the court acknowledged the parties prepared and executed several different purchase agreements that varied in different respects. It ultimately ruled the "operative agreement" consisted of two separate agreements, a purchase agreement and an addendum agreement. Recognizing the addendum was executed one day *before* the purchase agreement, and although the two documents clearly contain contradictory terms,

the court ruled the agreements must be "read together to the extent the Addendum does not contradict a term in the [purchase agreement]." After closely examining the court's findings, it becomes readily apparent the trial court selected provisions from both documents that it determined should be binding on the parties. Relevant to the issues raised in this appeal, the court determined FIC must repay deposits based on a provision contained in the purchase agreement, despite the fact that same provision was specifically modified in the addendum to provide for waiver of deposits. This ruling, and the entire judgment, cannot be affirmed because an addendum cannot predate the agreement it was intended to modify. We reverse the judgment and remand the matter for a new trial.

I

The basic underlying facts of the case are not in dispute. Mach-1 is a business owned and operated by brothers Barry Baptiste and Craig Baptiste (referred to collectively and in the singular as Baptiste). FIC had two principal shareholders, Spizzirri and Raymond Dixon. Dixon declared bankruptcy and was dismissed from the lawsuit. Dixon is not a party to this appeal.

In 2008, the parties began negotiating the sale of FIC's Family Honda Dealership located in Rancho Santa Margarita, California. After a succession of purchase agreements, it turned out Mach-1 was unable to obtain the required funding and could not close the deal. We will discuss each purchase agreement in light of the unique issues raised on appeal.

A. January 15, 2008, Agreement for Sale of the Dealership

FIC refers in its briefing to the "first purchase agreement" signed January 15, 2008, but it was not included in our record (hereafter the "First Agreement"). We mention it in our summary of the facts to provide some context for our later discussion, *infra*, regarding an addendum agreement executed exactly one year later on January 15, 2009. Mach-1 maintained the addendum served to modify the First Agreement.

B. June 19, 2008, Agreement for Sale of the Dealership

Our record contains a copy of the June 19, 2008, purchase agreement (hereafter the June Agreement). The agreed purchase price was $13.2 million and the parties scheduled a closing date of August 15, 2008. Paragraph 5.1 of this agreement required Mach-1 to deposit $250,000 into escrow. The June Agreement was signed by both Dixon and Spizzirri, individually, and as FIC's representatives.

C. October 23, 2008, Agreement for Sale of the Dealership, Interim Management Agreement, Promissory Note, and Voting Trust Agreement

When Mach-1 could not close the deal by the August 2008 deadline, the parties entered into a new purchase agreement on October 23, 2008 (hereafter the October Agreement). The agreed purchase price was reduced to $4.3 million and the closing date was scheduled for December 29, 2008.

The October Agreement contained a provision describing a loan to Spizzirri. Paragraph 1.16 provided Mach-1 agreed to loan Spizzirri and his wife $1 million memorialized by a separate promissory note, "the monies of which shall be provided to Seller[,]" i.e., FIC. Moreover, "To the extent that funds are drawn, Buyer to receive a credit against the purchase price. . . . In the event this transaction does not close, the Promissory Note and Guarantee to be retained by [Mach-1]."[1]

The October Agreement specified the sale of the dealership's fixed assets would be for $800,000 or a different sum based on an appraisal conducted at closing (Paragraph 1.1). The agreement contains five other paragraphs describing the sale price of other assets such as parts (Paragraph 1.2), new vehicles (Paragraph 1.3), used vehicles (Paragraph 1.5), and repair work in process (Paragraph 1.7). In addition, the parties agreed Mach-1 would purchase the dealership's "goodwill and other intangible assets" (including the Honda franchise) for $4.3 million (Paragraph 1.8).

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[1] The same day Spizzirri and his wife executed a promissory note, having a term of 210 days, promising to pay Mach-1 $1 million.

This $4.3 million figure was repeated in Paragraph 3, titled "Purchase Price." Mach-1 agreed to pay FIC through escrow $4.3 million for "goodwill and other intangible assets" plus valuation of the tangible assets described in Paragraphs 1.1 through 1.7.

The parties also included several provisions regarding escrow and closing. Paragraph 5.1, titled "Appointment of Escrow: Deposit" stated, "Upon opening of escrow, Buyer has previously deposited into escrow the sum of [$300,000] . . . to be applied to the purchase price." In addition, this paragraph noted, "Buyer will commit funds to escrow to be utilized pursuant to the Interim Management Agreement dated and effective October 23, 2008, by and among Seller and Buyer. To the extent that funds are drawn from such account, Buyer will receive a credit against the Purchase Price."

This last statement referred to a separate agreement the parties entered into the same day as the October Agreement. The parties executed an Interim Management Agreement (hereafter Management Agreement), in which the parties agreed Mach-1 (Baptiste) would supervise all operations at the dealership. The Management Agreement required Mach-1 to provide $1 million in funding "to the management account to fund the [d]ealership operations during the management period, to be drawn upon . . . at the sole discretion of Baptiste and Buyer . . . ." The same day, the parties also entered into a "Voting Trust Agreement." Spizzirri and Dixon transferred their share certificates into a trust listing Baptiste as trustee.

In summary, in October 2008 Mach-1 agreed to provide $2 million total (a $1 million loan to Spizzirri and fund $1 million towards management costs). The October Agreement recognized Mach-1 had already paid a $300,000 deposit into escrow. The October Agreement did not go through as planned and Mach-1 could not close the deal on December 29, 2008. However, the parties did not give up on trying to make the purchase work.

D. January 2009 Agreements

The record demonstrates the parties contemplated several different agreements after Mach-1 failed to close the deal described in the October Agreement. Our record contains an agreement executed on January 15, 2009, called "Addendum to Agreement for Sale of Automobile Dealership," (hereafter the 2009 Addendum). It states, "The parties to this Addendum have previously executed an 'Agreement for Sale of Automobile Dealership', ('Agreement') dated January 15, 2009. [¶] . . . By this Addendum the parties desire to clarify certain terms of the Agreement. It is intended by the parties hereto that this Addendum shall be read with the Agreement, and that if any terms of the Agreement conflict with this Addendum, this Addendum shall in all instances control."

By its plain terms, the 2009 Addendum was written to modify a new purchase agreement executed the very same day. However, at trial neither party produced a purchase agreement dated January 15, 2009. Indeed, one of the hotly contested issues at trial was whether a January 15th purchase agreement existed or had been lost.

FIC argued its owners, Spizzirri and Dixon, and Mach-1 executed a purchase agreement on January 15, 2009, and the original signed document was given to Mach-1. They characterized the agreement as being missing or lost. Mach-1 denied signing the missing agreement. To avoid confusion, we will refer to the purported missing purchase agreement, dated January 15, 2009, and that was specifically referred to in the 2009 Addendum, as the "Missing Agreement" in this opinion.

Mach-1 argued the 2009 Addendum related to the First Agreement, executed one year prior on January 15, 2008 (which is not part of our record), rather than the Missing Agreement. Alternatively, Mach-1 maintained it did not intend to be bound to the 2009 Addendum because the parties executed a "Restatement to Agreement for Sale" (hereafter the 2009 Restatement) the following day, on January 16, 2009.

The 2009 Restatement begins with a sentence saying the agreement "restate[d] in its entirety and replace[d] the prior [a]greement of the parties dated October 23, 2008[,] and the [f]irst [a]mendment thereto."[2] However, it was not an exact duplicate of the October Agreement. The purchase price of the dealership was reduced to $3,050,000 and the parties designated a closing date of February 28, 2009. And we note, FIC argued at trial that its owners did not sign the 2009 Restatement, and that Mach-1 attached their signatures from another document.

In sum, the parties presented evidence of two different operative purchase agreements and one addendum all executed in January 2009. First, on January 15, 2009, the parties executed the purported Missing Agreement and the 2009 Addendum. Second, on January 16, 2009, the parties purportedly executed the 2009 Restatement (to allegedly revive the terms of the October Agreement plus an amendment).

The court ruled the 2009 Addendum and the 2009 Restatement together comprise the operative agreement of the parties, even though the 2009 Amendment was executed one day before the 2009 Restatement and the documents do not refer to each other. The following is a comparison of these two documents, highlighting where they differ and which version the court adopted in making its final ruling in this case.

i. The $1 Million Loan

Both documents referred to Mach-1's $1 million loan to Spizzirri and his wife. In the 2009 Restatement (identical to the October Agreement), Paragraph 1.16, was titled "Loan to Marc Spizzirri and Spouse" and provided Mach-1 was to advance through escrow $1 million "as a loan" to Spizzirri and his wife, the loan would be memorialized

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[2] The parties fail to explain where to find in our record the "first amendment" of the October Agreement referenced in the 2009 Restatement. Our record contains a version of the October Agreement in which several provisions are crossed out and new terms were handwritten in the margins along with the initials of all the parties. It is unclear if these were the "first amendments" described in the 2009 Restatement or if these terms were intended to be part of the original agreement because none of the handwritten notations are dated.

in a promissory note and guaranteed by the seller, and the money would be provided to the seller.

Paragraph 6 of the 2009 Addendum stated "Paragraph 1.16 'Loan to . . . Spizzirri and Spouse' is hereby amended to provide that upon execution of this Addendum the Promissory Note in the sum of [$1 million] dated October 23, 2008, and executed by [Spizzirri and his wife], payable to the order of Buyer . . . shall be cancelled and shall be considered fully and completely satisfied." In short, the loan was deemed cancelled or forgiven.

The court ruled the 2009 Addendum controlled this issue. It denied Mach-1's request to be awarded $1 million plus interest from April 22, 2009 (210 days after the date of the note).

ii. Escrow & Funding for Operations

The 2009 Restatement Agreement stated in paragraph 5.1, "Appointment of Escrow: Deposit. The [c]losing of this transaction will be consummated through [the escrow company]. Upon opening of escrow, Buyer has previously deposited into escrow [$300,000], to be deposited in an interest-bearing account . . . to be applied to the [p]urchase [p]rice."

Paragraph 5.1 discussed other details relevant to escrow, including the requirement that Mach-1 start paying for the dealership's management costs. "Buyer will commit funds to escrow to be utilized pursuant to the Interim Management Agreement dated and effective October 23, 2008, by and among Seller and Buyer. To the extent that funds are drawn from such account, Buyer will receive a credit against the [p]urchase [p]rice." To summarize, pursuant to the 2009 Restatement, escrow held a $300,000 deposit plus $1 million to cover management costs.

The 2009 Addendum did not discuss or modify the obligation to provide funding for operating the dealership. The court determined Mach-1 was not entitled to repayment of any money committed to fund the dealership operations pursuant to the

Interim Management Agreement. It denied Mach-1's request for reimbursement of the $1 million. We will address the fate of the $300,000 escrow deposit in Part *iv* below.

iii. Purchase Price

In the 2009 Restatement, Paragraph 1.8, stated the parties agreed "Buyer shall purchase Seller's goodwill and other intangible assets . . . for [$3,050,000]. This amount is comprised of the following consideration: $1.4 million in assumed Honda Finance debt by Craig and Barry Baptiste personally, $1.3 million in cash proceeds *already provided* to Sellers, and $350,000 cash at closing." (Italics added.)

Paragraph 3, titled "Purchase Price" stated Mach-1 will pay to FIC "through escrow, or the assumption of obligations as described in [s]ection 1.8" the purchase price $3,050,000 *plus* valuation of [tangible assets described in Paragraphs] 1.1 through 1.7. Paragraph 3 noted, "[Mach-1] has previously released from escrow to Owners the sum of $300,000 to the applied purchase price. . . . Additionally, capital that has been contributed by Buyer to fund the working capital of the business in excess of the Promissory Note shall be deducted from the purchase price."

The 2009 Addendum calculated a different purchase price. The 2009 Addendum modified Paragraphs 1.1 through 1.7 relating to the sale of tangible assets. In Paragraph 1.1, the parties agreed Mach-1 would purchase the "fixed assets" as reflected in the appraisal "through a 50/50 distribution of Mach 1 profits until paid in full." Paragraphs 1.2 through 1.7 stated Mach-1 would purchase those tangible assets at closing "without limitation or qualification of any kind, at Seller's actual cost."

The 2009 Addendum also significantly modified Paragraph 1.8 regarding the sale of goodwill and intangible assets. It was amended to provide as follows: "a. The $1.4 million in Honda Finance debt assumed by . . . Baptiste shall be fully satisfied or refinanced by Closing so that Seller, [Spizzirri and Dixon] are completely exonerated from all further responsibility for such debt. [¶] b. Buyer shall be solely and fully responsible for all Company vendor payables . . . . [¶] c. Seller shall be paid the

sum of $400,000 cash, $200,000 upon execution of this Addendum, and $200,000 upon closing. [¶] d. After satisfaction of the purchase of the fixed assets (as outlined in Paragraph 1.1 . . .) through a 50/50 distribution of Mach-1 profits, [Spizzirri] shall receive 20 [percent] of Buyer's profits unless and until one of the following events occurs . . . ." One of the events was "[e]xpiration of a six-year period from the date of execution of this Addendum." And finally, the agreement provided that in addition to the profits already paid to Spizzirri, "he shall receive an additional $2 million lump-sum payment . . . ."

The court held, "The purchase price as stated in the 2009 Restatement was the operative price." It ignored the amendments listed in the 2009 Addendum regarding the sale price of tangible assets, goodwill, and the intangible assets (Paragraphs 1.1 through 1.8). The court did not explain the factual or legal basis for this decision. It determined Mach-1 was not liable for damages for breaching the contract because FIC was able to sell the dealership to a third party and apparently eliminated all of its damages. This ruling is not challenged on appeal but we include it in the factual discussion because it shows that as to the issue of purchase price the court determined the 2009 Restatement provisions were controlling and rejected the contrary terms contained in the 2009 Addendum.

iv. Remedy After Termination Without Closing

The 2009 Restatement provided in Paragraph 5.10 the following remedy: "Termination of Escrow Without Closing. Upon any termination of the escrow other than by closing, Buyer will be repaid its deposit, less, its prorata share of costs."

The 2009 Addendum contained a contradictory term. It provided "Paragraph 5.10 'Termination of Escrow Without Closing' is hereby amended to provide that if this transaction fails to close, for any reason except fraud or misrepresentation by or on behalf of Buyer, or bankruptcy of Buyer, and if Buyer has invested a minimum of $2 million cash into the Company after the date this Addendum is executed, then Buyer

shall receive 50 [percent] of the then-outstanding stock of Seller. In the event that this transaction fails to [c]lose for any reason, then Buyer subordinates to Seller any and all cash previously deposited into escrow prior to this Addendum, without limitation or qualification of any kind." In short, the 2009 Addendum provided Mach-1 would lose its deposit if the transaction failed to close without a $2 million investment.

The court determined the 2009 Restatement remedy provision applied and Mach-1 must be "repaid" its deposit. It ignored the contrary provision in the 2009 Addendum.

In addition, the court determined FIC and Spizzirri, *individually*, were responsible for repayment. It did not explain why FIC's other owner, Dixon, was excluded from this obligation.

The court calculated Mach-1 deposited $1.3 million prior to the 2009 operative agreements and $250,000 after the agreements were executed. It added these two figures together and ruled Mach-1 was owed $1,550,000 plus interest from August 13, 2009. The court did not explain why the 2009 Addendum's provision waiving the repayment obligation did not apply. It did not explain how it reached the figure of $1.3 million deposited prior to 2009, especially since it also ruled the $1 million loan and $1 million management funding loan were not recoverable. The court did not cite to any evidence supporting its calculation of $1,550,000.

v. Closing Provisions

The 2009 Restatement is 32-pages long and explains it simply revives the October Agreement, albeit with a few changes. Paragraph 20 provides, "This Agreement may not be changed, modified or amended except in writing, signed by the parties hereto . . . [t]his Agreement contains the complete understanding of the parties, and there are no oral agreements or representations not contained herein."

The 2009 Addendum contains "recitals" stating the purpose of the agreement is to "clarify certain terms" of a purchase agreement (also dated January 15,

2009). "It is intended by the parties hereto that this Addendum shall be read with the Agreement, and that if any terms of the Agreement conflict with this Addendum, this Addendum shall in all instances control." To further clarify this point, the 2009 Addendum contains in its two final closing provisions (paragraphs 8 and 9) the following warning: "The foregoing amendments shall control over any and all conflicting terms of the Agreement, whether or not such conflicting terms are expressly referred to herein or not. All non-conflicting terms of the Agreement are incorporated by this reference. [¶] Each party executing this Addendum represents and warrants that he has received all corporate and other approvals necessary to enter into this Addendum . . . ." Thus, both agreements have a full integration clause. It appears the parties agreed in both documents the terms in each would be controlling over all other terms.

E. The Trial

Trial began January 9, 2012, and lasted several weeks. The court considered the testimony of 14 witnesses and over 100 exhibits. The parties submitted closing argument briefs. At the end of April 2012, the court issued an initial statement of decision concluding the 2009 Restatement and the 2009 Addendum must be considered together as the final operative agreement. The court determined Mach-1 breached the agreement and the failure to close was its fault. However, the court did not award damages because FIC was "essentially made whole" by its subsequent sale of the dealership to NewSunCo.

Mach-1 objected to the statement of decision. It argued FIC and Spizzirri should have to repay $1,550,000 in deposits. FIC and Spizzirri responded to the objections and requested oral argument. The court denied their request.

Mach-1 submitted its proposed statement of decision that included language it was owed $1,550,000. FIC and Spizzirri objected to the proposed statement of decision, noting there was no evidence supporting the calculation of $1,550,000. They cited evidence the deposits totaled $550,000 and $300,000 of that sum was waived

pursuant to the terms of the 2009 Addendum. Spizzirri argued he should not be held personally liable because the sale was between FIC and Mach-1. They requested additional time to respond to the proposed statement of decision and oral argument. The court denied their request.

On October 10, 2012, the court issued a final statement of decision. We will recite the relevant portions of the court's statement of decision as follows:

"This [c]ourt finds at the outset that . . . [Mach-1] failed to prevail on any cause of action in its [c]ross-[c]omplaint [against NewSunCo]. [¶] This [c]ourt finds that the operative agreement between Mach-1 and [FIC] is the . . . 2009 Restatement . . . taken in conjunction with the . . . 2009 Addendum. The Addendum was indisputably signed. The court also finds that the [2009 Restatement] was signed by all parties . . . on January 16, 2012, and was acted on as the operative agreement subsequent to that date and that *it did not negate or supersede* the Addendum. *The two agreements must be read together to the extent the Addendum does not contradict a term in the [2009] Restatement.* Thus, the purchase price as stated in the [2009] Restatement is the operative price. The closing date is set forth in the [2009] Restatement as February 28, 2009. The Court finds that was never modified or waived . . . [¶] [and] Mach-1 has failed to prove that it had the ability to close the transaction. Mach-1 took a long look-see in 2008 in the midst of a near-depression cascade of the economy, this was more than ample opportunity to do a full due diligence on the part of Mach-1. Afterwards, it entered into the October . . . agreement. After more examination and as a more earnest seller, it entered into the . . . 2009 Addendum . . . and in its own desperation proposed the . . . 2009 Restatement, which [FIC] and . . . Spizzirri signed on January 16, 2009. The execution of the January 15, 2009 agreement is in dispute and due to the actions of the parties, the [c]ourt finds that the [2009] Restatement is the operative agreement taken in conjunction with the [2009] Addendum.

"In spite of the meandering application process shown by Mach-1, time was of the essence. . . . [F]ailure to close by [the closing] date was fatal. Failure to close was due to the actions of Mach-1 especially failure to submit its complete application materials to Honda. This was breach of the agreement. . . . [¶] What is clear is that this was a failed purchase in the midst of a sick dealership, deteriorating economic conditions and an eager but inexperienced buyer. The evidence does not support a finding of any fraud or deceit on the part of [FIC]. The [Interim] Managing Agreement is unenforceable due to illegality but was not entered into in bad faith based on the evidence. On the other hand, Mach-1 did not enhance the value of the dealership. Thus, the quantum meruit claim fails. Mach-1 was in the dealership as part of its due diligence. Under the Vehicle Code, [FIC] was prohibited from placing authority for the operations of the dealership into the hands of Mach-1. Mach-l could not operate under [FIC's] license. The [c]ourt does not find any fraud or deceit but the contract is still void. The [c]ourt does *not find* that Mach-1 is entitled to restitution from FIC and . . . Spizzirri for the $1,000,000 committed by Mach-1 to fund dealership operations pursuant to Paragraph 5.2 of the Interim Management Agreement.

"[A]s for constructive trust, Mach-1 has not established a right nor established what the trust would encompass. [¶] The [c]ourt does not find that the terms of the Addendum had conditions precedent. It was operative upon signing. [¶] The [c]ourt finds that specific performance is not a suitable remedy even if the facts supported a finding in favor of Mach-1 otherwise. To order specific performance, essentially unwinding of the RSM transaction would require lengthy and substantial involvement by the [c]ourt, and substantial uncertainties. Mach-1 did not show it was a ready, willing and able buyer as of the conclusion of the trial. The [c]ourt finds that an auto dealership is not unique. The parties have an adequate remedy at law.

"As for the breach of the purchase agreement as shown by the [2009] Addendum and the [2009] Restatement, the court finds that in light of the sale to

[NewSunCo, FIC], . . . Spizzirri and . . . Dixon were essentially made whole. The actions of Mach-1 did not interfere with [FIC's] prospective economic relations and did not cause damage to [FIC]. Any decrease in the sales price was due to market conditions and [FIC's] decision to proceed with a ready, willing and able buyer.

"Paragraph 5.10 of the [2009] Restatement Agreement provides, 'Upon any termination of the escrow other than by Closing, Buyer will be repaid its deposit, less its pro rata share of costs.' [Spizzirri], individually, and [FIC], are parties to both the [2009 Restatement] and the [2009] Addendum. The [c]ourt finds that pursuant to [P]aragraph 5.10 of the [2009 Restatement], Mach-1 is entitled to recover from [Spizzirri and FIC] its deposits of $1,300,000 made prior to the dates of the [2009 Restatement] and [2009] Addendum, plus interest thereon from August 13, 2009. The court also finds that pursuant to [P]aragraph 5.10 of the [2009 Restatement], Mach-1 is entitled to recover from [Spizzirri and FIC] its deposit of $250,000 made subsequent to the dates of the [2009 Restatement]and [2009] Addendum, plus interest thereon from August 13, 2009. The court does not find that pursuant to [P]aragraph 1.16 of the [2009 Restatement], Mach-1 is entitled to recover from [Spizzirri and wife] the sum of $1,000,000, plus interest from April 22, 2009 (210 days after the date of the Note), on their Promissory Note." (Italics added.)

II

We were unable to locate any rules of contract interpretation that would support the trial court's ruling the 2009 Addendum and 2009 Restatement can together be the operative agreement from which the court can pick and choose the controlling terms in the sale of a car dealership. Legally, the term "addendum" means "[s]omething to be added, esp[ecially] to a document; a supplement." (Black's Law Dict. (9th ed. 2009) p. 38.) The common language dictionary similarly defines "addendum" as "something that is added; *especially*: a section of a book that is added to the main or original text." ("addendum." *Merriam-Webster.com.* 2015. <http://www.merriam-

webster.com/dictionary/addendum> [as of March 23, 2015].) We found no authority, and the parties cite to none, holding an addendum can precede the document it is intended to modify.

Appellants challenge the trial court's interpretation of the two documents with respect to the limited issue of repayment of escrow deposits, and they assert our review is de novo. Respondents argue we must apply the substantial evidence test because there was conflicting evidence as to which documents constituted the parties' contract, and therefore the court's interpretation of the documents was a finding of fact. Applying either standard of review we must reverse the judgment.

We agree there was conflicting evidence as to which document was the operative contract. As stated, there was evidence two potential operative agreements were executed in January 2009: (1) the Missing Agreement with its 2009 Addendum, and (2) the 2009 Restatement of the October Agreement. As we will explain, the court's decision the 2009 Addendum and the 2009 Restatement should be combined despite direct conflicts in terms is incorrect as a matter of law, and the court's interpretation is not supported by substantial evidence.

We begin by reviewing the last signed document, which was the 2009 Restatement. Mach-1 asserts that because the 2009 Restatement was signed *after* the 2009 Addendum and contains an integration clause specifying it supersedes all other agreements, the court correctly relied on the term deposits must be repaid (ignoring the 2009 Addendum's provision deposits were forfeited). Mach-1 cites legal authority discussing the well-established parol evidence rule "that the terms contained in an integrated written agreement may not be contradicted by prior or contemporaneous agreements. In doing so, the rule necessarily bars consideration of extrinsic evidence of prior or contemporaneous negotiations or agreements at variance with the written agreement." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 344.)

However, the court in this case did not rule that the 2009 Restatement superseded all other agreements because of the integration clause. Mach-1's legal authority does not serve to support the court's judgment the transaction involved multiple contracts, and on this legal basis, the court enforced some terms from one agreement and some terms from the other.

Civil Code section 1642 allows two or more writings to be "taken together." It provides, "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (E.g., *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 580 [informed consent agreement and arbitration form signed at same time should be construed together]; *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1060 [trial period plan and loan modification agreements should be construed together]; *Fillpoint, LLC v. Maas* (2012) 208 Cal.App.4th 1170, 1178 [purchase agreement and employment agreement entered at roughly same time as part of single transaction must be construed together]; *Nevin v. Salk* (1975) 45 Cal.App.3d 331, 335, 338 [agreement of sale, two notes, real property deed of trust, and chattel mortgage formed single contract for sale of a veterinary practice].)

Generally, whether multiple contracts are intended to be elements of a single transaction under Civil Code section 1642 is a question of fact. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 534.) We found no facts in this record to support the conclusion the 2009 Restatement and the 2009 Addendum should be read together. True, they both related to the sale of a car dealership and were executed close in time. But they did not reference each other or contain even an acknowledgement the other existed. Rather, the 2009 Restatement and the 2009 Addendum each refer to completely different purchase agreements, which is especially relevant in a case such as this where there was a long history of failed purchases and each variation significantly changed the terms of the deal.

Specifically, the 2009 Addendum plainly states it amends a purchase agreement (the Missing Agreement) created the very same day, on January 15, 2009. In contrast, the 2009 Restatement makes no mention of these agreements and claims to revive the terms of the October Agreement (a deal that expired a few weeks prior on December 29, 2008). Under Civil Code section 1644, contract language is to be given its ordinary common meaning, unless it is clear the parties intended a special or technical meaning. As stated earlier, by its common meaning, an Addendum is something to be added to a document. (Black's Law Dict. (9th ed. 2009) p. 38.) The 2009 Addendum plainly stated it was created to add and modify the terms of an existing agreement executed the same day (although we recognize it cannot now be located). There is nothing to suggest the 2009 Addendum was executed to modify the terms of a future purchase agreement not yet executed. If the parties had intended for the 2009 Addendum to modify the 2009 Restatement it would have referenced it, or at a minimum, would not have included several integration clauses declaring the 2009 Addendum's terms to be "controlling" above all. Similarly, the parties would not have included in the 2009 Restatement a standard integration clause declaring it was the final agreement that may not be changed except by a subsequent writing. And finally, the plain terms of the 2009 Restatement declares it to revive the October Agreement and makes no mention of the Missing Agreement or the 2009 Addendum executed the day before. The terms of the 2009 Restatement concur with the ordinary definition of "restatement" as being "something that is restated." ("restatement." *Merriam-Webster.com.* 2015. <http://www.merriam-webster.com/dictionary/restatement> [as of March 23, 2015].) There is nothing to suggest the parties in executing the 2009 Restatement intended to be part of a transaction involving multiple contracts, and certainly not part of an earlier addendum to a missing contract.

Moreover, there was no testimonial evidence to support the court's ruling. In the briefing, neither party suggests it was their theory the 2009 Addendum and the

2009 Restatement were intended to be construed together. To the contrary, FIC presented evidence the 2009 Addendum related to the Missing Agreement and it did not execute the 2009 Restatement. Mach-1 argued the 2009 Addendum related to the First Agreement and was entirely superseded by the 2009 Restatement.

We conclude the court's ruling is not supported by evidence and cannot be supported by the rules of contract interpretation in a de novo review. The judgment is based on the inconsistent findings that the purchase price and promissory note forgiveness provisions contained in the 2009 Addendum were enforceable, but the provision forfeiting Mach-1's deposits was not. We conclude the entire judgment must be reversed and the matter remanded for a new trial to sort out the contractual obligations of the two entities.

Based on this ruling, we will not address Spizzirri's argument he cannot be held personally liable for escrow deposits paid for FIC's sale of the dealership absent an alter ego finding. If on remand the court determines the 2009 Addendum is enforceable, and the deposit was waived, this issue becomes moot. We do not issue advisory opinions. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) For this same reason, we need not address whether there was evidence to support the court's calculation Mach-1 made a $1,550,000 deposit into escrow and this entire sum must be refunded. And finally, we conclude our reversal of the judgment obviously renders moot Mach-1's appeal seeking attorney fees as the prevailing party in the underlying action. It would be premature to determine the prevailing party based on our reversal and remand for a new trial.

III

The judgment is reversed and the matter is remanded for a new trial. Appellants FIC and Spizzirri shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.